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No. 84-587 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

AUVERGNE D'ANTIGNAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process by the district court's failure to reverse his conviction on the ground that one of the government's witnesses was later convicted of perjuring himself at petitioner's trial.

2. Whether, when one of a myriad of factors relied upon to justify a Customs officer's decision to board a vessel later proved erroneous, the remaining factors still furnished reasonable suspicion for the boarding.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 2c) is unreported. The district court's opinion (Pet. App. 1a-6a) also is unreported. The opinion of the court of appeals on petitioner's direct appeal is reported at 628 F.2d 428 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1984. The petition for a writ of certiorari was filed on October 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner and four other defendants were convicted on all four counts of an indictment charging conspiracy to import 28,310 pounds of

marijuana, in violation of 21 U.S.C. 963; importation of the marijuana, in violation of 21 U.S.C. 952(a); conspiracy to possess the marijuana with intent to distribute it, in violation of 21 U.S.C. 846; and possession of the marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a total of ten years' imprisonment, to be followed by a ten-year special parole term. He also was fined a total of $50,000.[1]

1. The evidence at trial showed that in early 1978, petitioner approached Jack Gore, an unindicted co-conspirator who testified for the government, regarding a "get-rich-quick" scheme. The scheme involved using one of Gore's several shrimp boats, the *Little Hornet*, to transport a large shipment of marijuana from Colombia to the United States. Gore's boats were docked near Valona, Georgia, at a dock he had purchased known as the old Kittles's Dock. *United States* v. *D'Antignac*, 628 F.2d 428, 430 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981).

Petitioner and Gore met in Fort Myers, Florida, to make final plans and to load the *Little Hornet* with supplies for the trip to South America. The *Little Hornet* departed for Colombia in late May 1978. During the time just before her departure and continuously thereafter, petitioner and Gore communicated with each other by use of a rudimentary telephone code. According to their plan, Gore would have nothing more to do with the shipment except pilot the *Little Hornet* into Kittles's Dock upon her return from Colombia. *United States* v. *D'Antignac*, 628 F.2d at 430.

The *Little Hornet* returned from Colombia loaded with marijuana, and on June 8 she was about 20-30 miles off the coast of Mayport, Florida. That evening, Gore and several

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[1]When petitioner had served two years and one month in prison, the district court, acting under Fed. R. Crim. P. 35, reduced petitioner's sentence of imprisonment to time served.

others boarded the *Miss Shantell* and headed toward the *Little Hornet*. The two vessels rendezvoused at about noon the next day, June 9. Following a brief discussion between Gore and crew members of the *Little Hornet*, the two vessels headed for Sapelo Sound, off the Georgia coast. Once they reached the Sound, Gore boarded the *Little Hornet*, as planned, and piloted her through the Intracoastal Waterway to Kittles's Dock. *United States* v. *D'Antignac*, 628 F.2d at 430-431. During that journey, petitioner pulled alongside the *Little Hornet* in a smaller boat to unload a small amount of marijuana from the *Little Hornet* (Trial Tr. 89-91). Arriving at Kittles's Dock in the *Little Hornet* at about 11 p.m., Gore's task was complete. *United States* v. *D'Antignac*, 628 F.2d at 431.

Petitioner appeared at the dock, and he and his co-defendants began to string up lights to assist in their unloading of the vessel. Their plans were altered, however, when the truck into which they planned to load the marijuana ran into a utility pole, knocking out all the lights and power. Petitioner telephoned Gore and told him that the *Little Hornet* would be leaving Kittles's Dock. Then, still loaded with marijuana, the *Little Hornet* started a return journey to the Intracoastal Waterway. *United States* v. *D'Antignac*, 628 F.2d at 431.

At about midnight on June 9, Customs Officer Duane Swigert was at Brannen's Dock in Belleville, Georgia, awaiting the return of other officers investigating an unrelated matter. As he waited, Officer Swigert surveyed the area and observed a light atop the mast of a vessel out in the Intracoastal Waterway, about four miles away. He watched the vessel for about one hour, and he saw it move continuously north and south, changing its course between the lighted channel markers several times before finally heading in toward the Valona dock area. His suspicions aroused by the boat's erratic movements and the lateness of the hour,

Officer Swigert decided to investigate. He and other officers drove five miles to the Valona dock area, losing sight of the mastlight at several points along the way. *United States* v. *D'Antignac,* 628 F.2d at 431.

Once he arrived at the dock area, Officer Swigert and his colleagues turned off their automobile lights. They saw the *Little Hornet,* her name clearly legible on her hull, pull into the dock. Officer Swigert had received an office memorandum indicating that Gore's shrimp boats, including the *Little Hornet,* were suspected of being involved in drug smuggling. That information, coupled with his belief that the coastal waters were then closed for shrimping, increased Officer Swigert's suspicions, and he decided to investigate further. *United States* v. *D'Antignac,* 628 F.2d at 431.

After the *Little Hornet* docked, Officer Swigert approached the vessel, identified himself, and boarded the boat. When he had taken only one step to the doorway of the pilothouse, he saw a large, partially opened bale at his feet. After inspecting and smelling a quantity of the leafy green substance he saw in plain view, he determined it was marijuana and arrested the crew members. The officers then conducted a search of the cargo hold and discovered the 28,310 pounds of marijuana. *United States* v. *D'Antignac,* 628 F.2d at 431.

After the vessel and its passengers had been secured and Officer Swigert and another officer were leaving the dock area, Officer Swigert saw a van carrying petitioner and two others turn into the dock area. Thinking that the van might be arriving to unload the marijuana, Officer Swigert stopped the van and questioned its passengers about their identities. Receiving evasive answers and observing that one of the passengers was armed, Officer Swigert arrested petitioner and the other passengers as suspects in connection with the marijuana found on board the *Little Hornet.* *United States* v. *D'Antignac,* 628 F.2d at 432.

2. The court of appeals affirmed petitioner's conviction. *United States* v. *D'Antignac, supra.* The court held first that Officer Swigert's investigatory boarding and search of the *Little Hornet,* and the subsequent arrest of the occupants of the van, were not violative of the Fourth Amendment, and it thus upheld the denial of petitioner's motion to suppress the marijuana. The court of appeals ruled that the validity of the investigatory boarding and search in this case was dictated by *United States* v. *Serrano,* 607 F.2d 1145, 1148 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980), which held that Customs officers may make an investigatory stop of a vessel in inland waters adjacent to the open Gulf of Mexico under 19 U.S.C. 1581(a) on facts that justify a reasonable suspicion of illegal activity. Reviewing the facts known to Officer Swigert in this case, the court concluded that his investigatory boarding of the *Little Hornet* and his stop of the van as it turned into the dock area were supported by reasonable suspicion. *United States* v. *D'Antignac,* 628 F.2d at 432-435.

The court of appeals also rejected petitioner's objection to Gore's testimony on the ground that it was perjured and was the product of an undisclosed promise made to him by the government. The court first noted that it was not at all clear that Gore had perjured himself because his entire line of testimony was by way of recollection and " 'to the best of my ability.' " *United States* v. *D'Antignac,* 628 F.2d at 435. Furthermore, the purpose of the mid-trial conference between Gore and the prosecutor that had given rise to petitioner's suspicion of an alleged hidden agreement with the government was merely to inform Gore that he need not identify a person only by visual means and that a voice identification was permissible. *Ibid.* In addition, the jury was aware of the government's immunity agreement with Gore; the court of appeals described that agreement as including immunity from prosecution for events arising

from the *Little Hornet* smuggling scheme, as well as a different smuggling scheme involving another one of Gore's boats, the *Stonefield Lady;* a promise to release an $11.5 million tax lien; and the return of the *Little Hornet. Id.* at 435 & n.9.[2] Thus, the jury was fully informed on the subject of Gore's credibility, and the jury was properly instructed on that issue. *Id.* at 435-436 & n.10. The court of appeals therefore concluded that the alleged error was not material to the outcome of the verdict. *Id.* at 436.

The court of appeals also rejected petitioner's argument that the district court erred in failing to require full compliance with his discovery requests. The court noted that the requested information related only to alleged drug smuggling aboard the *Stonefield Lady.* Thus, the evidence was not exculpatory but was at most cumulative evidence regarding Gore's credibility. *United States* v. *D'Antignac,* 628 F.2d at 436. The court also held that petitioner's reliance on *Brady* v. *Maryland,* 373 U.S. 83 (1963), was inapt because the evidence allegedly withheld was not material to guilt or innocence and would not have created any reasonable doubt that did not otherwise exist (see *United States* v. *Agurs,* 427 U.S. 97 (1976); *Giglio* v. *United States,* 405 U.S. 150, 154 (1972)). In any case, the court of appeals concluded that even if the withheld material had included evidence material to guilt or innocence, it would still uphold the district court's ruling because petitioner was unable to articulate his dissatisfaction with the government's

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[2]In fact, the immunity agreement did not mention the *Stonefield Lady* at all. The agreement was phrased in terms of dates, *i.e.,* immunity from prosecution for any drug-related offenses committed through June 10, 1978. (A copy of the immunity agreement is reproduced as an Appendix to this brief.) As matters turned out, the agreement was broad enough to encompass an incident involving the *Stonefield Lady,* but there is no indication that it was drafted with that incident in mind. See page 11, *infra.*

production of over 340 pages of records except to state that the amount was insufficient. *United States* v. *D'Antignac,* 628 F.2d at 436-437.[3]

This Court denied petitioner's petition for a writ of certiorari in which he challenged the stop of his van as well as the warrantless search of the *Little Hornet.* 450 U.S. 967 (1981).

3. On or about January 31, 1983, the United States Attorney's Office for the Southern District of Georgia learned that a special grand jury was considering returning an indictment against Gore. The United States Attorney's Office had been unaware of the nature of the grand jury's investigation because the special grand jury was being conducted by lawyers from the Department of Justice in Washington, D.C. and was supervised by a judge from outside the Southern District of Georgia. As a result of a request for information, the United States Attorney's Office received copies of the relevant grand jury testimony on March 2, 1983. The next day, the government filed a notice of disclosure advising all defendants, including petitioner, that it had obtained evidence that Jack Gore had perjured himself in the trial of this case.[4]

On May 18, 1983, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence (Pet. App. 1a). Alternatively, he sought coram nobis relief under the All Writs Act, 28 U.S.C. 1651(a) (Pet. App. 1a). Because the government's disclosure notice was filed on March 3, 1983, two years and one day after this Court had denied

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[3]The court of appeals also rejected petitioner's claim that the district court erred in denying his motion to dismiss the indictment based upon his challenges to the arrays of the grand and petit juries under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1869. *United States* v. *D'Antignac,* 628 F.2d at 437.

[4]Jack Gore was subsequently convicted of the perjury he committed at petitioner's trial, and his conviction was affirmed. *United States* v. *Skinner,* 747 F.2d 708 (11th Cir. 1984).

petitioner's certiorari petition, petitioner claimed that he was barred by the two-year time limit of Fed. R. Crim. P. 33 from moving for a new trial based on newly-discovered evidence.[5]

The district court ruled that, regardless of the timing of petitioner's request, he was not entitled to any relief (Pet. App. 1a). After reviewing the record of the original trial and the evidence and argument offered at the hearing on petitioner's motion, the court rejected petitioner's argument that his conviction should be overturned on account of Gore's perjured testimony (*id.* at 1a-6a).

Gore's perjured testimony at petitioner's trial was his denial that the *Stonefield Lady,* another of his shrimp boats, was sunk while engaged in a marijuana importation scheme. The district court ruled that the evidence that the *Stonefield Lady* actually had been involved in drug smuggling was simply cumulative impeachment evidence (Pet. App. 2a-3a). At trial, the evidence showed that Gore had received immunity from prosecution for drug-related offenses (see pages 5-6 & note 2, *supra*). Petitioner and his co-defendants had tried to show that the *Stonefield Lady* had been scuttled by Gore to hide another unrelated smuggling venture. Because the new impeaching testimony was cumulative of other testimony relative to Gore's credibility and had no bearing on petitioner's guilt,[6] the district court

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[5]Petitioner concedes (Pet. 15) that he was told in September 1982 by DEA Agent Gordon Raynor, the case agent at his trial, that Gore had lied when he testified at petitioner's trial. Petitioner offers no satisfactory explanation for his failure to file a timely motion for a new trial based on Raynor's information.

[6]The district court noted that the court of appeals had considered the evidence against petitioner overwhelming. *United States* v. *D'Antignac,* 628 F.2d at 436. Moreover, after he was in custody, petitioner had, in several letters to the district court in which he sought reduction of his sentence, repeatedly admitted his guilt (Pet. App. 2a). That the perjured

ruled that it did not satisfy *Agurs's* requirement that the omitted perjured evidence must create a reasonable doubt that did not otherwise exist in order to justify a new trial (Pet. App. 3a (citing *United States* v. *D'Antignac*, 628 F.2d at 436)). In the circumstances of this case, therefore, the district court ruled that due process was not violated.

The district court also rejected petitioner's claim that Officer Swigert's boarding of the *Little Hornet* was unjustified because one of the factors supporting his suspicions turned out to be erroneous. Petitioner demonstrated that shrimping was not out of season, as Officer Swigert had thought, and thus petitioner argued that any inferences based on the fact that the *Little Hornet* was a shrimper were unreasonable. Pet. App. 3a-4a. The district court simply concluded that the panoply of factors supporting Officer Swigert's reasonable suspicion was more than adequate to uphold the finding of reasonable suspicion, without regard to the shrimping season factor. *Id.* at 4a (citing *United States* v. *D'Antignac*, 628 F.2d at 434).

The court of appeals affirmed in a judgment order without opinion (Pet. App. 2c).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that he was deprived of a fair trial because the jury was unaware that Jack Gore had lied when he denied the use of the *Stonefield Lady* for a drug smuggling operation. Petitioner argues that the jury might not have credited that part of Gore's testimony implicating petitioner in the *Little Hornet* scheme had it known of Gore's perjury with respect to the *Stonefield Lady*. We

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testimony in this case did not cast doubt on the issue of petitioner's guilt was the principal basis on which the district court distinguished *Mesarosh* v. *United States*, 352 U.S. 1 (1956), upon which petitioner relied during the Section 2255 hearing (Pet. App. 4a-5a).

submit that petitioner has not shown that he is entitled to relief under 28 U.S.C. 2255.[7]

To establish a prima facie case that a conviction should be vacated because it was obtained through the use of perjured testimony, a defendant must show both that the testimony was false and that the government knew or should have known of the falsity. *Holleman* v. *United States,* 721 F.2d 1136, 1138 (7th Cir. 1983); *Lindhorst* v. *United States,* 658 F.2d 598, 602-603 (8th Cir. 1981), cert. denied, 454 U.S. 1153 (1982); *United States* v. *Conzemius,* 611 F.2d 695, 697 (8th Cir. 1979); *United States* v. *Robinson,* 585 F.2d 274, 279 (7th Cir. 1978), cert. denied, 441 U.S. 947 (1979); see also *United States* v. *Agurs,* 427 U.S. at 103. Petitioner has clearly satisfied the first part of his burden, but he failed to present any evidence as to the second.

The district court stated that "there [was] not even a breath of suspicion that the prosecution knew Gore was perjuring himself when he denied knowledge of The Stonefield Lady's involvement in smuggling marijuana" (Pet.

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[7]While stating that he does not allege that the prosecutor acted in bad faith (Pet. 15), petitioner nevertheless suggests (*id.* at 14-16) that the government manipulated its disclosure of Gore's perjury so that petitioner was barred by the two-year time limit of Fed. R. Crim. P. 33 from seeking a new trial based on newly-discovered evidence. The record does not support this claim. Not only did the prosecutor disclose the fact of Gore's perjury the day after he learned of it, but petitioner concedes that DEA Agent Gordon Raynor informed him of the perjury in September 1982, seven months before the expiration of the two-year period. Petitioner's explanation for his failure to move for a new trial under Rule 33—the lack of proof to substantiate Raynor's statement—does not withstand scrutiny. Had petitioner moved for a new trial based on Raynor's statement, the district court could have determined the basis for Raynor's statement in the course of addressing petitioner's motion. Under these circumstances, a substantial question arises whether petitioner should be permitted to use Section 2255 to circumvent the time limitation of Rule 33. See *Bean* v. *United States,* 679 F.2d 683, 684 (7th Cir. 1982).

App. 3a). Indeed, in the course of resolving issues arising out of petitioner's discovery request, the district court directed the government to inquire of all the relevant investigative agencies, including the Coast Guard, whether there was any suspicion that the *Stonefield Lady* had been involved in drug smuggling, and that inquiry had yielded nothing. In addition, a Navy diver who had explored the submerged *Stonefield Lady* testified that he had discovered no evidence of marijuana or other contraband (Trial Tr. 374, 377, 382-383).

Petitioner made no effort at the Section 2255 hearing to establish that the prosecutor knew or should have known that Gore's testimony was perjured. Petitioner's only submission on this issue is speculation based upon the immunity agreement with Gore; he reasons (Pet. 8) that the government would not have granted Gore immunity for events surrounding the *Stonefield Lady* if it did not believe that the vessel had been involved in illegal activity. In reality, the government's immunity agreement with Gore did not even mention the *Stonefield Lady*. See note 2, *supra*, and App., *infra*, 1a. Although the terms of the agreement are broad enough to encompass the *Stonefield Lady*, they afford no support for the conclusion that the government knew about any illegal activities involving her.[8]

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[8]Similarly lacking in probative value regarding the government's knowledge of perjured testimony is the district court's opinion of Gore's testimony, expressed during Gore's perjury trial (see Pet. 8). Petitioner's belief that Gore's testimony was incredible on its face, even if that opinion was later shared by the district court, does not support the conclusion that the government knew of or had evidence of Gore's perjury. Moreover, the district court suggested that Gore's lack of candor worked to petitioner's advantage. "If anything, Gore restrained himself and really did not come clean with what he knew about [petitioner], because I watched him, you know. * * * [Gore] did not come clean * * * with what he knew about [petitioner's] involvement" (8/25/83 Tr. 6).

Having failed to prove that the government knew or should have known that Gore's testimony was perjured when he gave it, petitioner is entitled to relief only if he can show that the perjury rendered his trial fundamentally unfair. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). The district court's opinion below, as well as the court of appeals' decision on petitioner's direct appeal, demonstrate that petitioner cannot make that showing.

Gore's perjured testimony did not create a reasonable doubt of petitioner's guilt that did not otherwise exist. *United States* v. *Agurs*, 427 U.S. at 112-113.[9] Gore's perjury regarding the *Stonefield Lady* was relevant only to the issue of his credibility. But Gore's credibility already had been impeached,[10] and the jury already had learned that the

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[9]As the court of appeals stated, "the overwhelming evidence of guilt in this case belies any notion that the [cumulative impeachment] material might have created a reasonable doubt" of petitioner's guilt. *United States* v. *D'Antignac*, 628 F.2d at 436. Petitioner's suggestion (Pet. 12) that the only evidence of his involvement with the smuggling scheme was his mere presence at the scene of an arrest is fatuous. Third parties corroborated Gore's testimony that petitioner had been involved in Fort Myers with the preparation of the *Little Hornet* for its journey to Colombia (Trial Tr. 183, 184). Independent testimony also showed that a truck discovered at Kittles's Dock on the night of the arrests had been in petitioner's possession (Trial Tr. 186, 197-199). Moreover, petitioner was not just present at the scene of an arrest. He was present at a remote place at a late hour with a large truck just at the time that a large shipment of marijuana was being delivered. In addition, his arrival at a rendezvous that had been changed at the last minute cast even more doubt on any claim that he knew nothing about the plan.

[10]At the hearing on petitioner's Section 2255 motion, the following colloquy occurred between petitioner and the district court (8/25/83 Tr. 22):

> MR. D'ANTIGNAC: May I just ask one quick question, Your Honor?
>
> THE COURT: Sure.
>
> MR. D'ANTIGNAC: Do you think that if the jury had known that Mr. Gore had perjured himself in any part of my trial, that they would have reached the same verdict?

government had entered into an extensive immunity agreement with Gore that included his involvement in this as well as any other drug smuggling activities during the time period covered by the agreement. As part of his defense, petitioner had attempted to impeach Gore with testimony regarding the *Stonefield Lady*. There was evidence that the Coast Guard had received reports that the boat had been loaded with marijuana and that Gore had failed to salvage the vessel when told that it had been found sinking in the Gulfstream (Trial Tr. 356, 361, 366). Indeed, the cross-examination regarding the *Stonefield Lady* was so extensive that the district judge commented that "[w]hen you read the transcript of that trial, two-thirds of it involved * * * Gore and the STONEFIELD LADY. I heard the STONEFIELD LADY so many times during the trial * * *, it just almost drove me deaf " (8/25/83 Tr. 6). Thus, petitioner's argument, like his *Brady* claim that he was prejudiced by the district court's denial of additional evidence impeaching Gore, "could be described as cumulative at best." *United States* v. *D'Antignac*, 628 F.2d at 436.[11]

THE COURT: Yes. They did not place a lot of stock in him. You watched him; I did. And I watched Gore — for gosh sakes, why the Government would ever make a deal with a man like him, I do not know — from what he produced in that case — because frankly, if they had come up and said that he had reneged on his agreement, I believe I would have sustained them, because that jury did not place any stock in Jack Gore. And you know that community did not place any stock in Jack Gore, better than anybody.

[11]Petitioner contends (Pet. 9) that the district court's finding that Gore's statement was material for purposes of 18 U.S.C. 1621 was inconsistent with its conclusion below that Gore's statement was simply cumulative impeachment testimony. Petitioner is mixing apples and oranges. That a false statement is material for purposes of a perjury prosecution—that is, *capable* of influencing the tribunal on the issue before it—does not mean that on the record of this case it *actually* had that effect.

Petitioner's claim boils down to an argument that it is unfair that he was convicted at a trial at which a witness perjured himself. But due process does not guarantee a trial without irregularities. "The only pertinent guarantee is that aspect of due process which makes a conviction unconstitutional 'if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt,' *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979), and [petitioner] is not challenging the inference of guilt from the 'record evidence adduced at the trial.' " *Bean* v. *United States*, 679 F.2d 683, 685 (7th Cir. 1982). Thus, the courts below correctly refused to set aside petitioner's conviction.[12]

2. Petitioner's argument (Pet. 16-17) that there were insufficient facts, absent Officer Swigert's erroneous assumption that shrimping was out of season, to constitute reasonable suspicion for the boarding of the *Little Hornet* under 19 U.S.C. 1581(a) is an entirely fact-bound question that does not merit further review. Petitioner had a full and fair

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[12]Also inapt is petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1 (1956), in which this Court reversed a conviction upon the Solicitor General's presentation of extensive evidence of perjury by the government's paid informer in other proceedings occuring subsequent to petitioners' trial. That the Court's decision was based upon its belief that the witness's probable perjury at petitioners' trial was material is demonstrated by the fact that the Court distinguished cases, such as the instant one, in which a defendant presented untruthful statements by a government witness as newly discovered evidence affecting the witness's credibility. When such statements are " 'merely cumulative or impeaching,' " they do not form an adequate basis for the grant of a new trial. 352 U.S. at 9. See also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 357 (1963).

This case, which does not involve a claim that the government knew of, but failed to produce, *Brady* material, is distinguishable from *United States* v. *Bagley*, cert. granted, No. 84-48 (Nov. 13, 1984), and *United States* v. *Pflaumer*, cert. pending, No. 84-1033. Thus, this petition need not be held for disposition of those cases.

opportunity to litigate this issue at trial and on direct appeal, and it is not open to him to seek to relitigate it on this collateral attack (*Stone* v. *Powell*, 428 U.S. 465 (1976)), especially since whether or not shrimping was in season cannot be considered newly discovered evidence. In any event, as the district court noted (Pet. App. 4a), a broad array of factors supported Officer Swigert's reasonable suspicion, and no single factor was determinative. Moreover, petitioner's argument is no longer tenable in light of *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1985

DOJ-1985-02

APPENDIX

TO: Randall M. Clark
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RE: JACK GORE

Dear Mr. Clark,

As chief of the Criminal Section of the U.S. Attorney's Office, Southern District of Georgia, I Elizabeth Calhoun Chaulker, agree and promise that Mr. Jack Gore will be granted transactional immunity, State and Federal, from prosecution for any offenses related to the Control Substances Act, State and Federal, up to and including June 10, 1978 and specifically including December 1977 and January of 1978. This office further agrees under the auspices of the United States Customs Bureau to return to Mr. Jack Gore the shrimp trawler the Little Hornet which was seized on June 10, 1978 without fine or penalty and to withdraw the assessment of 11 million, 3 hundred, 12 thousand Dollars said assesment being the levy on 6-15-78. The U.S. Attorney's Office, Southern District of Georgia, and the Department of Justice, further agrees not to prosecute Lenon Skinner, Ricky Skinner, Sherrel Flemming or Christene Skinner for their particpation in the case of the June 10, 1978 marijuana seizure from the shrimp trawler the Little Hornet.

In return for the affisaid agreement and promise, Mr. Jack Gore agrees to cooperate fully with the depart of Justice in connection with the investigation of the December

1977 and January 1978 transaction and the marijuana conspiracy occurring on or about June 9 or 10, 1978. Mr Gore agrees to testify if necessary in the trial of the above mentioned trasaction. No civil penalties will be assessed against Jack Gore for any of the above.

/s/

Elizabeth Calhoun Chaulker